IMPOSSIBILITY AS A DEFENSE TO THE PERFORMANCE OF A CONTRACT. — The title of "Impossibility" to designate a class of defenses for the non-performance of contracts, though custom has now made its use mandatory, is a most unfortunate one, for there never has been a time in the history of the common law when the simple impossibility of performing a contract excused the promisor from liability thereunder;[1] while, on the other hand, by far the greater number of cases collected under this head are not cases of actual impossibility at all. What, therefore, the title really indicates is that there are some instances in which a party will be excused from carrying out his promise because it has become more difficult for him to do so than it was at the time the promise was made.

These instances in the early common law were few, because the courts took the position that a party could have provided against such contingencies by the terms of his contract.[2] In the course of time, however, they have greatly increased in number, and are now usually collected under the three general heads of impossibility created by domestic law, by destruction of the subject-matter of the contract, and by sickness, insanity, or death of a party to a contract of personal services.[3] The reason universally assigned by the courts for excusing performance in these cases is that the proper interpretation of the contract shows that the parties did not intend to be bound on the happening of the excusing contingency. Thus, in the very instances where the promisor was formerly held liable for not providing against the event by his contract, he is now excused because of an implied condition in his favor in that same contract. The old rule was logical, though it often worked great injustice; the new rule is made to bring about a desirable result, but is based on entirely untenable premises, for it seems clear that the doctrine of implied intention is a pure fiction. Sir Frederick Pollock has said that any evidence of intention is so seldom forthcoming in these cases that the court relies on its own view of what the parties ought to have intended.[4] The simple truth of the matter is that the cases show that these defenses are allowed on the equitable ground that conditions have so changed between the time of contracting and the time for performance that it would be unjust to compel performance.[5] This is also shown by the fact that the defense must be set up affirmatively, and that, if the so-called impossibility could have been foreseen, it is no excuse.[6]

The equitable nature of this defense is further emphasized by the comparatively recent extension of it to cases where, not the subject-matter of the contract, but the means of performing it has been destroyed,[7] and, also, to cases where performance of a contract for personal services has become dangerous to life or health. An illustration of the latter extension is found in a late case where an English sailor was held justified in leaving his

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1 Y. B. 22 Edw. IV., pl. 26; Reid *v.* Alaska Packing Co., 43 Ore. 429.

2 Paradine *v.* Jane, Al. 26.

3 See Anson on Contracts, 10th ed., 342.

4 Wald's Pollock on Contracts, 3d ed., 519.

5 Clarksville Land Co. *v.* Harriman, 68 N. H. 374. To be accurate, it should be said that there are two distinct classes of cases in which difficulty imposed by law is held to be a defense. If the very act which the promisor agreed to perform is declared illegal, the ground of the defense is public policy. Cordes *v.* Miller, 39 Mich. 581. But if, as is commonly the case, the statute simply makes the performance of a perfectly legal act impossible or difficult, the defense rests on the same equitable basis as in the other two general classes. Bailey *v.* De Crespigny, L. R. 4 Q. B. 180.

6 Jennings *v.* Lyons, 39 Wis. 553.

7 Buffalo, etc., Land Co. *v.* Bellevue, etc., Co., 165 N. Y. 247.

ship upon learning that it was laden with contraband of war. *Sibbery* v. *Connelly*, 22 T. L. R. 174 (K. B. D. Dec. 18, 1905). This was no case of actual impossibility, nor can any implied intention be found; but conditions had totally changed since making the contract, and a reasonable man would have been justified in declining to assume the increased risk.[8]

RECENT CASES.

ADVERSE POSSESSION — WHO MAY GAIN TITLE — POSSESSION UNDER CLAIM OF RIGHT AGAINST ALL BUT SOVEREIGN. — Public land was granted to a railroad company under which the defendant claims as grantee. Subsequently the plaintiff entered upon the land, intending to acquire title from the government under the Timber Culture Act. He remained in possession until the statute of limitations had run, and then brought an action to quiet his title. *Held*, that to constitute adverse possession a claim of right against all but the government is sufficient, and the plaintiff's title is therefore good. *Blumer* v. *Iowa Land Co.*, 105 N. W. Rep. 342 (Ia.).

For a discussion of the principles involved, see 18 HARV. L. REV. 380.

AGENCY — DISCLOSED PRINCIPAL'S RIGHTS AND LIABILITIES UNDER AGENT'S CONTRACTS WITH THIRD PERSONS. — A document signed by the defendants stated that as deacons of a church they invited the plaintiff to the pastorate at a specified salary. "We regret to state that our present income will not warrant anything higher now, but," etc. The plaintiff, upon acceptance, acted as treasurer, and out of the surplus of funds on hand paid himself his salary. *Held*, that, as on the face of the contract the plaintiff had pointed out to him the fund out of which he was to be paid, the defendants are not personally liable. *Morley* v. *Makin*, 22 T. L. R. 7 (Eng., K. B. D., Oct. 26, 1905). See NOTES, p. 456.

ANIMALS — DAMAGE TO PERSONS BY ANIMALS — WHAT AMOUNTS TO KEEPING AND HARBORING A DOG. — The plaintiff, who was bitten by a vicious dog at large upon the street, brought action against the defendant. The defendant was not the owner of the dog, but permitted her porter, who worked upon her premises, to keep it thereon, both having knowledge of its vicious propensities. The jury found for the plaintiff. *Held*, that the question whether the defendant kept or harbored the dog was properly submitted to the jury, and that the verdict will not be disturbed. *Barklow* v. *Avery*, 89 S. W. Rep 417 (Tex., Civ. App.).

Even at common law one who keeps or harbors a vicious dog, knowing its vicious propensities, seems to be responsible for its actions, although he is not the owner. *M'Kone* v. *Wood*, 5 C. & P. 1; *Bundschuh* v. *Mayer*, 81 Hun (N. Y.) 111. But now this liability is quite generally imposed or defined by statute. Yet precisely what constitutes "keeping or harboring" has been usually left to the courts to define. In a few cases the language used by the court would sustain the rule that merely to permit the dog to remain upon the premises constitutes a "harboring." *Jacobsmeyer* v. *Poggemoeller*, 47 Mo. App. 560. But the better and generally accepted rule seems to be that the question is one of fact for the jury, who are to decide it in the light of all the evidence. *Whittemore* v. *Thomas*, 153 Mass. 347. And the test usually given them is that the dog must have been in the possession or control of the defendant as a domestic animal. *Cummings* v. *Riley*, 52 N. H. 368. Or, if kept by servants or agents, the dog must be kept in some sense for the defendant's benefit. *Baker* v. *Kinsey*, 38 Cal. 631; *Collingill* v. *City of Haverhill*, 128 Mass. 218.

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[8] See Walsh *v.* Fisher, 102 Wis. 172, 179.